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July 12, 1999

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

Re: EX PARTE PRESENTATION
Allocation of Spectrum at 2 GHz for Mobile-Satellite Service
ET Docket No. 95-18

Dear Ms. Salas:

The ICO USA Service Group ("IUSG") and ICO Global Communications ("ICO") are again arguing that MSS services should be authorized to operate in the 2 GHz band and to displace broadcast auxiliary services (BAS) without having to pay to relocate BAS licensees to comparable facilities, in flagrant violation of the *Emerging Technologies* relocation/compensation principle.[1] On behalf of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters, this letter urges the Commission to reject these arguments and to resolve quickly the mechanism by which MSS entrants will compensate 2 GHz incumbent licensees for relocating to comparable facilities.

Background. In 1992, the FCC decided, after consideration of public comments and Congressional will, that the best way to introduce new services into occupied spectrum, while preserving existing services and minimizing the economic impact on incumbent licensees, was to require new entrants to relocate the incumbents to comparable facilities.[2] The Commission then decided, after full consideration of all the issues involved, to apply this

[1] *See Ex Parte* Presentations of IUSG (June 21, 1999) and of ICO (June 18, 1999) filed in ET Docket No. 95-18.

[2] *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies ("Emerging Technologies"),* ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992), *Second Report and Order*, 8 FCC Rcd 6495 (1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993); *Memorandum Opinion and Order,* 9 FCC Rcd 1943 (1994); *Second Memorandum Opinion and Order,* 9 FCC Rcd 7797 (1994); *aff'd. Association of Public Safety Communications Officials- International, Inc. v. FCC,* 7 F.3d 395 (D.C. Cir. 1996).

relocation/compensation principle to the relocation of BAS licensees to permit MSS entrants access to 2 GHz spectrum.[3] Specifically, the Commission determined that MSS operators should bear all reasonable and actual costs necessary to clear the 1990-2025 MHz band for MSS operations without disrupting or degrading existing BAS services.

MSS entities clearly do not want to pay the price of entry to the 2 GHz band. In 1997, ICO and others argued in a reconsideration petition that MSS entrants should not have to compensate BAS incumbents because the DTV conversion required BAS licensees to upgrade to digital anyway – an argument that the FCC recognized as fallacious.[4] Earlier this year, in another petition for reconsideration, ICO argued that the MSS relocation/compensation decision was tantamount to giving incumbents a property right to spectrum.[5] In May, ICO filed an *ex parte* submission contending that application of the relocation/compensation principle to non-U.S. satellite systems violates the 1967 Outer Space Treaty.[6] Now, in their recent *ex parte* submissions, IUSG and ICO propound yet another theory to obtain access to the 2 GHz spectrum at the expense of incumbent services and the public that relies on them. No new circumstances justify consideration of these submissions or reconsideration of the Commission's relocation/compensation decision in this proceeding.

The Specious Takings Analogy. IUSG urges the Commission to consult Fifth Amendment takings cases for the proper measure of compensation new entrants should pay to relocate incumbents. But IUSG does not explain what the power of eminent domain to condemn private land has to do with the conditions the FCC may place on a licensee to operate in a particular spectrum band. In fact, the notion of just compensation under the takings law has nothing to do with the principle of compensation under the *Emerging Technologies* precedent.

In the principal takings case that IUSG cites, the United States Supreme Court held that the Fifth Amendment does not require the federal government to fully compensate private parties when it takes their property.[7] Rather, the government is only required to provide "just compensation." The determination of what is just requires the balancing of the government's need for property and the owner's loss of that property. It requires consideration of "'what compensation is just to an owner whose property is taken *and* to the public that must

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[3] *See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service,* ET Docket No. 95-18, *First Report and Order and Further Notice of Proposed Rule Making,* 12 FCC Rcd 7388, 7402, 7414 (1997); *Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Or*der, 13 FCC Rcd 23949 (1998).

[4] *See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service,* ET Docket No. 95-18, *Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Or*der, 13 FCC Rcd 23949 (1998) (denying the Petition for Partial Reconsideration of the MSS Coalition, filed by ICO Global Communications, *et al.* (May 20, 1997)).

[5] *See* Petition for Further Limited Reconsideration of the *Memorandum Opinion and Order and Order*, filed by ICO Services Limited (a wholly owned subsidiary of ICO Global Communications) (Jan. 19, 1999). This petition is pending.

[6] *See Ex Parte* Presentation of ICO Services Limited filed in ET Docket No. 95-18 (May 5, 1999).

[7] *United States v. 564.54 Acres of Land*, 441 U.S. 506, 512 (1979) ("*Lutheran Synod*").

pay the bill.'"[8] Although the Court seeks to put the owner "'in as good a position pecuniarily as if his property had not been taken,'" the Court acknowledges that "this principle of indemnity has not been given its full and literal force."[9] Courts have resorted to fair market value as the measure of compensation not because this measure fully compensates property owners, but because it strikes a "'balance between the public's need and the claimant's loss' upon condemnation of property for a public purpose."[10] In this way, "the indemnity principle [of full compensation] must yield to some extent before the need for a practical general rule."

IUSG's takings analogy is inapplicable to the 2 GHz relocation because it is based on compensation for lost property rights, which are not involved in the spectrum use context. In the spectrum relocation context, where there is no exercise of eminent domain and the government is not taking anyone's property for a public purpose, the Commission has decided that it *will* give full and literal force to the principle of indemnity in admitting new services to already-occupied spectrum. This is because the Commission developed the relocation/compensation principle not to provide "just compensation" for property taken for public use – instead, the principle is a spectrum management tool designed to make spectrum available for new services without disrupting or economically crippling equally-valuable existing services. Thus, the FCC has made the policy decision that it is in the public interest to have new spectrum users provide incumbent spectrum users with comparable facilities when the existing users are displaced. The Commission has also determined that compensating licensees merely for the depreciated value of their equipment is insufficient to enable incumbents to construct comparable facilities, and thus to remain in full operation, in replacement spectrum.[11]

The study by Charles River Associates, submitted by both IUSG and ICO in their filings, offers a formula for applying the just compensation principle of regulatory takings law to spectrum relocation. Whatever the merits of that formula in the abstract, it has no bearing here because it is derived from the false premise that the BAS relocation can be analogized to regulatory takings cases. Those cases are simply irrelevant to implementation of the Commission's relocation/compensation decision.

A Better Analogy. We are not claiming, and have never claimed, that BAS licensees have a property right in 2 GHz spectrum. Nor do we think it necessary for the Commission to rely on a property rights-based analogy to determine the appropriate measure of compensation in the unique spectrum relocation context. Indeed, since the Commission has already settled this issue generally in the *Emerging Technologies* decisions and specifically in

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[8] *Id.* (*quoting United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950) (emphasis added).
[9] *Lutheran Synod,* 441 U.S. at 512 (*quoting Olson v. United States*, 292 U.S. 246, 255 (1934)).
[10] *Id.* (*citing United States v. Toronto, Hamilton & Buffalo Nav.* Co., 338 U.S. 396, 402 (1949)).
[11] *See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order and Further Notice of Proposed Rule Making,* WT Docket No. 95-157, 11 FCC Rcd 8825, 8844 (*"Microwave Cost-Sharing R&O"*) ("[C]ompensation for the depreciated value of the old equipment would not enable [incumbents] to construct a comparable replacement system without imposing costs on the incumbent, which would be inconsistent with [FCC] relocation rules").

prior orders in this proceeding, there is no need for it to consider the issue further. But, if the Commission should wish to look to a property rights-based analogy to help guide the determination of compensation in this context, it should look not to takings law, which involves governmental payments coincident to the exercise of the sovereign's power of eminent domain, but to common law tort remedies, which more appropriately involve private party payments for property damage or destruction. In the spectrum relocation context, where private entities, not the government, are compensating "injured" parties, the Commission has not faced the same imperative to balance between "the public's need and the claimant's loss."[12] The relocation/compensation principle reflects this. Because the goal in the relocation context is not to put incumbents "in as good a position pecuniarily" as if there had been no relocation, but to ensure the continued operation of valuable existing services, the Commission has determined that the measure of compensation should be the full repair or replacement cost necessary to fully maintain operations at the new location.

This same determination – that when facilities are compromised, the amount of compensation should be the cost to obtain comparable facilities – is common in tort law. It is well established that replacement cost is a permissible measure of actual damages sustained when property is damaged or destroyed.[13] In such cases, the "market" in "fair market value" is the market to which the plaintiff must go to replace the damaged or destroyed property.[14] MSS use of 2 GHz spectrum will damage or destroy the utility of existing BAS facilities and, as the Commission has now stated at least three times, MSS licensees accordingly should pay for the construction of comparable facilities to ensure that BAS services continue to be provided to the public – whether that requires retuning, retrofitting or replacing existing BAS equipment.

The goal of the *Emerging Technologies* relocation/compensation principle is the same as this damages principle of tort law. The principle is designed to "ensure that incumbents are no worse off than they would be if relocation were not required."[15] This means that incumbents should be no worse off pecuniarily *or operationally*. This is particularly important in the BAS relocation, where the facilities to be relocated provide critically important electronic newsgathering services that are an essential component of broadcasters' service to the public.

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[12] *Lutheran Synod*, 441 U.S. at 512.

[13] *See United States v. Crown Equipment Corporation*, 86 F.3d 700, 710 (7th Cir. 1996). *See also Puget Sound Power & Light Co. v. Strong*, 816 P. 2d 716 (Wash. 1991) (upholding award based on replacement cost where damaged property has no market value). *See generally,* Dan B. Dobbs, LAW OF REMEDIES at 5.14 (1993) ("the plaintiff may be entitled to . . . have the jury instructed that repair or replacement cost is the appropriate measure of damages . . .").

[14] *See* RESTATEMENT (SECOND) OF TORTS at 911.

[15] *Microwave Cost-Sharing R&O*, 11 FCC Rcd at 8825.

Please direct any questions to the undersigned.

Respectfully submitted,

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